

NO. PD-1247-18

IN THE  
COURT OF CRIMINAL APPEALS  
OF TEXAS  
AUSTIN, TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
2/27/2019  
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SIDNEY ALEX WORK

APPELLANT,

VS.

THE STATE OF TEXAS,  
APPELLEE

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***APPELLANT'S  
BRIEF ON THE MERITS***

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NO. 03-18-00244-CR  
COURT OF APPEALS FOR THE  
THIRD DISTRICT OF TEXAS AT AUSTIN

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On appeal from Cause Number 3106  
in the 35<sup>th</sup> District Court of Mills County, Texas  
Honorable Stephen Ellis, Presiding

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## **IDENTITIES OF PARTIES AND COUNSEL**

Pursuant to the provisions of Tex. R. App. P. 38.1(a), a complete list of the names of all parties to this action and counsel are as follows:

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**TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:**

NOW COMES Sidney Alex Work, Appellant in this case, by and through his attorney, Keith S. Hampton, and, pursuant to the provisions of Tex. R. App. Pro. 38, *et seq.*, files this brief.

**STATEMENT OF THE CASE**

Appellant was charged by indictment with possession of a controlled substance (methamphetamine) in a drug-free zone and with tampering with evidence. (CR, p. 9). Tex. Health & Safety Code §481.134; Tex. Penal Code §37.09(a)(2). On May 26, 2016, after a jury trial, he was convicted of both offenses. (CR, pp. 63-65). The trial court sentenced him to six years of confinement in the Institutional Division of the Department of Criminal Justice for possession of a controlled substance in a drug-free zone and two years of confinement for tampering with evidence. (CR, pp. 73-75). On June 28, 2016, Appellant filed a *Notice of Appeal*. (CR, p. 78).

This brief is due Friday, March 1, 2019, and is timely filed.

## **ISSUES PRESENTED**

GROUND FOR REVIEW ONE: The Court of Appeals erred when it held that prior possession and use of contraband may be admitted to prove knowledge of contraband and intent to possess contraband under Rules 403 and 404(b) of the Texas Rules of Evidence.

GROUND FOR REVIEW TWO: The Court of Appeals erred when it held that prior possession and use of contraband may be admitted under Rules 403 and 404(b) of the Texas Rules of Evidence to rebut the defensive theory that the defendant lacked knowledge of the presence of contraband.

GROUND FOR REVIEW THREE: The Court of Appeals erred when it held that prior possession and use of contraband may be admitted under Rules 403 and 404(b) of the Texas Rules of Evidence to prove the identity of the person who possessed the contraband.

GROUND FOR REVIEW FOUR: The Court of Appeals erred when it held that prior possession and use of contraband may be admitted under the doctrine of chances.

## **SUMMARY OF THE PERTINENT FACTS**

Appellant was stopped for speeding. (Vol. 7, pp. 33-37). The police searched his truck and discovered a baggie of methamphetamine at the bottom of a coffee cup on the passenger's side of the truck where his companion, Ms. Morgan, was seated. (Vol. 7, pp. 52-53). During the search, Appellant confessed in detail to his drug addictions, his prior drug conviction, and enough arrests that his familiarity with his *Miranda* warnings evoked a "figured that" from the arresting officer. (State's exhibits 7 & 13). The videos were at least as informative. (State's exhibits 7 & 13).

## **SUMMARY OF THE ARGUMENT**

The trial court admitted Appellant's drug history and prior use and possession of contraband under three theories: knowledge, rebuttal and identity. The extraneous evidence proved nothing more than Appellant must have knowingly possessed it because he is a drug addict with a prior history of drug possession. None of this evidence was relevant to any contested issue and none can be justified on a non-propensity basis. Thus, the trial court should have excluded the evidence.

The State never offered the doctrine of chances as a theory of admissibility to the trial court and the trial court did not admit the evidence under this doctrine. This argument should not be considered because it was brought for the first time on appeal. Even if it were considered, the doctrine is inapplicable to the circumstances of this case and would fail for the same reasons as the other theories of admissibility.

Even if the evidence could be admitted under Rule 404(b), the trial court should have excluded it under Rule 403. The State had no need for this evidence. The evidence confused Appellant's familiarity with illegal drugs with the question whether he was aware of the meth baggie in the coffee cup. In this confusion, the evidence misled the jury to focus not on the evidence of Appellant's guilt, but his propensity for drug use and his character as a drug addict. Rule 403 forecloses these improper bases for finding guilt.

## **ARGUMENT**

**I. The Court of Appeals erred when it held that prior possession and use of contraband may be admitted to prove knowledge of contraband and intent to possess contraband under Rules 403 and 404(b) of the Texas Rules of Evidence.**

**II. The Court of Appeals erred when it held that prior possession and use of contraband may be admitted under Rules 403 and 404(b) of the Texas Rules of Evidence to rebut the defensive theory that the defendant lacked knowledge of the presence of contraband.**

**III. The Court of Appeals erred when it held that prior possession and use of contraband may be admitted under Rules 403 and 404(b) of the Texas Rules of Evidence to prove the identity of the person who possessed the contraband.**

### **State's Case in Chief**

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On June 2, 2015, Mills County Deputy James Purcell observed a pickup truck traveling 8 miles per hour over the speed limit. (Vol. 7, pp. 17-18; 33). As the truck neared the Goldthwaite City Park, Purcell and his fellow deputy, Johnny Brown, stopped the driver, Appellant, for speeding. (Vol. 7, pp. 17; 33-37). The Park is a drug-free zone and the place where the police ordered Appellant to stop was 66 feet from the Park, across the road. (Vol. 7, pp. 33-37).

Appellant was driving and Marla Morgan was the passenger. (Vol. 7, pp. 40-41). Purcell sought to search his truck and Appellant acquiesced. (Vol. 7, p. 46). As the search was underway, Appellant told the police that a broken marijuana pipe could be found in the cup holder of the console, and the police discovered it where

Appellant had said. (Vol. 7, pp. 47; 49; 101; 109)(Vol. 8, pp. 32-33).

Deputy Purcell then found a lidded cup of coffee between the console and passenger's seat. (Vol. 7, p. 109). He removed the lid and discovered a baggie of marijuana floating on the coffee and a baggie of methamphetamine at the bottom of the cup. (Vol. 7, pp. 52-53). The passenger, Marla Morgan, denied ownership. (Vol. 7, p. 54).

### **State's Opening Statement**

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The prosecution told the jury:

We're not here for the marijuana; we're not here for the marijuana pipe. We're here for the possession of methamphetamine. And the evidence is going to show you that – not only the evidence that you're going to see convinced the deputies, but it will convince you that Mr. Work had knowledge that the methamphetamine was there in the car, there in the truck, full knowledge that it was there, and, therefore, he was in possession of it. It wasn't in his pocket. It was found in a coffee cup that was located between Ms. Morgan<sup>1</sup> and Mr. Work.

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[I]t will be clear that Mr. Work was not only in possession of that methamphetamine, but that he was part of the process to hide that methamphetamine, conceal it, in an attempt to make it unavailable for the officers.

(Vol. 7, pp. 12-13).

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<sup>1</sup> It is unclear whether Ms. Morgan was ever served with a subpoena. (Vol. 7, pp. 80-81). She did not testify.

## **State's Extraneous Misconduct Evidence Introduced to the Jury**

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Over objection, the trial court permitted the prosecution to introduce extraneous evidence:

Q. ... Deputy Purcell, prior to requesting consent to search Mr. Work's vehicle and the record check or history check that you did with his identifying information, did you receive information of prior law enforcement contacts with Mr. Work?

A. I did.

Q. And in follow-up to that, did you ask Mr. Work about that?

A. I did.

Q. Did you ask him if he had ever been arrested for drugs?

A. I did.

Q. And how did – what did he tell you?

A. He has.

Q. He had?

A. He had.

Q. Did he, in fact, have a prior felony possession of drugs conviction?

A. Yes.

(Vol. 7, p. 100).

Q. Did you and/or Deputy Brown follow up with Mr. Work about his prior drug usage?

A. I did, or we did.

Q. Specifically as it would relate to methamphetamine?

A. Yes, we did.

Q. How did you do that?

A. I asked when was the last time he had used methamphetamine.

Q. And what did he tell you?

A. Approximately two to three months ago.

Q. And did you ask how he used methamphetamine?

A. I did.

Q. Why do you do that?

A. I mean, there's numerous ways to use methamphetamines. You can eat it, you can sniff it, you can snort it, you can ingest it by food. I mean, you can inject it by needles.

Q. And how did he respond?

A. He stated that he used a needle.

(Vol. 7, p. 103). The prosecution then introduced testimony regarding the habits of addicts. (Vol. 7, pp. 104-105).

Over objection, the trial court also permitted the prosecution to introduce Deputy Purcell's dashcam video that revealed, among other matters, four conversations with Appellant:

(1) Officer Brown asks Work if he had ever been arrested and for what, and Work answered that he had been arrested before “for drugs” (14:00);

(2) Work admits that he has a prior felony conviction and made the admission in relation to a discussion about the use of illegal drugs (11:00);

(3) Officer Purcell states that he is going to read Work his *Miranda* rights and that Work knows what his rights are, and Work responds, “yes sir.” Officer Purcell then states that he “figured that” Work had been read those rights before; and (55:49)

(4) Officer Purcell asks Work, “how long has it been since you used methamphetamine ... or weed?” Work replied, “Weed. It’s been Today. Meth. It’s been probably three or two and a half months.” Officer Purcell then asked Work “how did you use it?” Work indicated that he used a needle. Officer Purcell asked where on his body Work injected himself, and Work stated that he did so on his arm and that the injection sites were healing.

*Work v. State, supra* at 28-29.

Over objection, the court permitted the prosecution to introduce on the second day of trial a similar video from Deputy Johnny Brown’s dashcam. (Vol. 8, p. 36)(State’s Exhibit 13). The prosecution then cherry-picked the first half-hour of tape to play for the jury. (Vol. 8, pp. 37-38)(“I will not be playing this start to finish, as the jury has seen Deputy Purcell’s start to finish. I anticipate that I will let the first 20 to 24 or 25 minutes run, and then I will be skipping large portions[.]”).

## **Trial Court's Admission of the Extraneous Evidence**

The trial court admitted all of this uncharged misconduct evidence under the following theories: (1) it proved Appellant's knowledge and intent; (2) it rebutted counsel's opening statement and (3) it proved the identity of the person who possessed the contraband. (Vol. 7, pp. 84-87; 89). These theories are reflected in the trial court's limiting instructions to consider the extraneous evidence only "in determining the knowledge, intent, identity, and to rebut a defensive theory, and for no other purpose in this case." (Vol. 7, p. 99)(Vol. 8, p. 37)(CR, p. 58).

## **General Principles for the Admission or Exclusion of Extraneous Evidence**

Rule 401 states the rule of logical relevance:

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Tex.R.Evid. 401. Earlier courts viewed the admission of extraneous bad acts as a matter of relevance, as this Court explained with some exasperation:

[W]hen contemporaneous crimes are admitted for the various purposes for which they may be used, it means that character of contemporaneous crimes that sheds some light on the transaction then under discussion. The defendant may have committed the burglary, and stole the property of other people. He may have stolen Mr. Haeger's pig, or Mrs. Ewing's cup, or Mr. Jackson's hay, but they are not shown to have had any

connection with or to shed any light upon the question that was then being tried by the jury. And so with this transaction. The fact that appellant had previously been convicted and paid a fine for selling Waukesha, beer or other intoxicants, would not be evidence of his guilt of the charge now on trial.

*Lee v. State*, 45 Tex.Crim. 51, 52, 73 S.W. 407, 407 (1903)(reversing conviction for selling Waukesha because State introduced his prior Waukesha conviction).

The relevant portion of Rule 404 states:

**(a) Character Evidence.**

**(1) Prohibited Uses.** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

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**(b) Crimes, Wrongs, or Other Acts.**

**(1) Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

**(2) Permitted Uses; Notice in Criminal Case.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence – other than that arising in the same transaction – in its case-in-chief.

Tex.R.Evid. 404.

Extraneous evidence may be admitted if it is first shown to be material and relevant to a contested issue. *Casey v. State*, 215 S.W.3d 870, 882 (Tex.Crim.App. 2007)(“material and relevant to a contested issue”)(citation omitted); *Abdnor v. State*, 871 S.W.2d 726, 738 (Tex.Crim.App. 1994)(“material and relevant to a contested issue in the case”)(citations omitted); *Albrecht v. State*, 486 S.W.2d 97, 100 (Tex.Crim.App. 1972)(“material and relevant to a contested issue in the case”)(citations omitted). The evidence must also have “relevance apart from its tendency ‘to prove character of a person in order to show that he acted in conformity therewith.’” *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex.Crim.App. 1991)(op. on reh’g)(quoting Rule 404(b)).

As the proponent of the extraneous evidence, the State bears the burden of showing why the evidence proves something other than character or propensity. As the 7<sup>th</sup> Circuit put it in a case where the government introduced two prior drug convictions in a prosecution for possession with intent to distribute:

[The government notes], correctly enough, that all crimes charging intent to distribute are specific intent crimes and that this evidence was admissible to show intent. It also notes correctly that it has the burden of proving the specific intent element beyond a reasonable doubt. But these observations do nothing to help us tell the difference between the illegitimate use of a prior conviction to show propensity and the proper use of a prior conviction to prove intent. To do that, the government must affirmatively show why a particular prior conviction tends to show the more forward-looking fact of purpose, design, or volition to commit

the new crime. A prior conviction may be relevant to show intent if the defendant concedes that he possessed the drugs but denies that he planned to distribute them, or if he denies knowing that the substance was contraband. Merely introducing prior convictions without more, however, can prove nothing but propensity, which is not enough to take the evidence out of the exclusionary principle established by Rule 404(b).

*United States v. Jones*, 389 F.3d 753, 757-58 (7<sup>th</sup> Cir. 2004), *judgment vacated on other grounds*, 144 F.App'x 563 (7<sup>th</sup> Cir. 2005) (“Propensity and intent are two different things ... even if only a fine line sometimes distinguishes them”).

The Supreme Court of the United States has explained the policy of the inadmissibility of character conformity evidence:

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

*Michelson v. United States*, 335 U.S. 469, 475-476 (1948)(citations omitted). These

policies are reflected in Rules 401, 403 and 404 of the Texas Rules of Evidence.

“The general rule in all English speaking jurisdictions is that an accused is entitled to be tried on the accusation made in the state’s pleading and not on some collateral crime, or for being a criminal generally. The rule is now deemed axiomatic and is followed in all jurisdictions.” *Young v. State*, 159 Tex.Crim. 164, 165, 261 S.W.2d 836, 837 (1953). Rule 404 is meant to protect this right and thereby fulfill due process:

Evidence of a defendant’s bad character traits possesses such a devastating impact on a jury’s rational disposition towards other evidence, and is such poor evidence of guilt, that an independent mandatory rule was created expressly for its exclusion. *See* Rule 404. *See also* Imwinkelreid, *Uncharged Prior Misconduct*, Sec. 1.02 (1984) (“Evidence of uncharged misconduct strips the defendant of the presumption of innocence.”).

*Mayes v. State*, 816 S.W.2d 79, 86 (Tex.Crim.App. 1991). This policy is well-established in Texas law. *Hernandez v. State*, 109 S.W.3d 491, 494 (Tex.Crim.App. 2003)(purpose of 404(b) is to ensure that no conviction “be based on the assumption that the accused is a criminal generally or that he is a person of bad character”); *Couret v. State*, 792 S.W.2d 106, 107 (Tex.Crim.App. 1990)(“general rule” that accused be tried on accusations and not on collateral bad acts which establish him as a criminal); *Nance v. State*, 647 S.W.2d 660, 662-63 (Tex.Crim.App. 1983)(this Court has “consistently” upheld this principle); *Watson v. State*, 146 Tex.Cr.Rep. 425, 175

S.W. 2d 423 (1943)(rule is “policy of the law”); *Enix v. State*, 108 Tex.Crim. 106, 110, 299 S.W. 430, 432-33 (1927)(violation of rule held prejudicial error); *Bowman v. State*, 70 Tex. Crim. 22, 155 S.W. 939 (1913)(reversal because proof of extraneous burglaries in trial for burglary merely proved defendant was a burglar; many case citations).

### **Standard of Review**

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The trial court’s decision to admit extraneous evidence under Rules 404(b) and 403 is reviewed for abuse of discretion. *Montgomery v. State, supra* at 391.<sup>2</sup> The trial court does not abuse its discretion unless its determination lies outside the zone of reasonable disagreement. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex.Crim.App.

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<sup>2</sup> As this Court has explained:

[A]ppellate courts uphold the trial court’s ruling on appeal absent an “abuse of discretion.” That is to say, as long as the trial court’s ruling was at least within the zone of reasonable disagreement, the appellate court will not intercede. The trial court’s ruling is not, however, unreviewable. Where the appellate court can say with confidence that by no reasonable perception of common experience can it be concluded that proffered evidence has a tendency to make the existence of a fact of consequence more or less probable than it would otherwise be, then it can be said the trial court abused its discretion to admit that evidence. Moreover, when it is clear to the appellate court that what was perceived by the trial court as common experience is really no more than the operation of a common prejudice, not borne out in reason, the trial court has abused its discretion. In either event the appellate court should recognize that the trial court erred to admit the proffered evidence, and proceed to determine harmfulness[.].

*Montgomery v. State, supra* at 391.

2010). A decision is within the zone of reasonable disagreement “if the evidence shows that 1) an extraneous transaction is relevant to a material, non-propensity issue, and 2) the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury.” *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex.Crim.App. 2009). As discussed *infra*, the trial court’s decision to admit evidence of Appellant’s prior drug conviction and criminal history while portraying him as a drug addict falls outside the zone.

**Knowledge was not a contested element of the crime of possession.**

Possession of a controlled substance is an offense requiring both (1) knowledge or intent and (2) the exercise of actual care, custody, control or management over the contraband. Tex. Health & Safety Code §481.002(38)(defining the act of possession), §§481.102(6) & 481.115(a)-(b) (“knowingly and intentionally possessed” methamphetamine). But it is not enough that the person possesses contraband. He must know that what he actually possesses is contraband to satisfy the requirements of this penal statute. None of the extraneous evidence was admitted on this basis.

Under Section 6.03 of the Texas Penal Code, the *mens rea* of this offense can be established by proving either that it was the defendant’s “conscious objective or

desire to engage in the conduct” “with respect to the nature of his conduct,” (general intent) or that he was “aware of the nature of his conduct” (knowledge). Tex. Penal Code §6.03(a) & (b). Practically speaking, general intent is, here, indistinguishable from knowledge. *United States v. Bailey*, 444 U.S. 394, 405 (1980)(“In a general sense, ‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent.”)(citation omitted). Accordingly, Appellant will therefore address intent and knowledge as intent/knowledge under the facts of this case.

The intent/knowledge element refers to the defendant’s knowledge that the substance he obtained or received was contraband. *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex.Crim.App. 2005), *overruled on other grounds*, *Robinson v. State*, 466 S.W.3d 166 (Tex.Crim.App. 2015)(citations omitted)(unlawful possession of a controlled substance requires the accused must have known the matter possessed was contraband); *King v. State*, 895 S.W.2d 701, 703 (Tex.Crim.App. 1995)(element the State is obligated to prove is that the accused “had knowledge that the substance in his possession was contraband.”)(citations omitted). In this case, there was no issue regarding Appellant’s appreciation of the nature of the contraband.

**The uncharged misconduct evidence does not prove intent or knowledge apart from propensity or character conformity.**

The State argued on appeal that Appellant’s “felony conviction shows Appellant’s familiarity with what a controlled substances [sic] is, what it looks like, and how drug users act when in possession of a controlled substance.” (State’s brief, p. 16). Appellant’s knowledge of the nature of contraband was never contested. The State confused this knowledge with Appellant’s contested awareness of the presence or location of the contraband.

Knowledge of the nature of possessed contraband is different from knowledge of the presence or location of the contraband. When an actor denies knowing the nature of contraband, he is making an issue of the knowledge element in the case against him.<sup>3</sup> However, when an actor denies knowing the location or presence of contraband, he, like Appellant, is not making an issue of his knowledge of the nature of contraband. The Court of Appeals, like the prosecution and trial court, confused these two types of knowledge.

Appellant’s prior drug use, arrests for drug possession and criminal history resulting in his familiarity with his *Miranda* rights do not prove that he knew there

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<sup>3</sup> In that case, the State may prove the former by proving the defendant has a familiarity with the contraband, which may well be done with prior extraneous experience.

was a meth baggie at the bottom of Ms. Morgan's coffee cup except under a propensity or character conformity rationale: Because he was a drug addict, he must have known the contraband was there. This rationale is precisely what Rule 404(b) forbids. *Perry v. State*, 933 S.W.2d 249, 254 (Tex.App. – Corpus Christi 1996, *pet. ref'd*)(holding that prior possession conviction has no probative value other than through a propensity rationale). This Court should vindicate the *Perry* opinion.

**The uncharged misconduct evidence does not rebut Appellant's opening statement apart from propensity or character conformity.**

The trial court did not decide Appellant's objections to the extraneous conversations until after opening statements. During his opening statement, counsel for Appellant stated:

The evidence is going to show that Mr. Works (sic) didn't know about anything else there. He states that.

The evidence is going to show further that Laura Morgan had the coffee cup, and the coffee cup was not in the console; it was found in the passenger seat where she was sitting. He was the driver. Further, it should show that she is the one who stated that it was hers, and she put both items in the coffee cup. She also wondered why they were arresting Mr. Work.

(Vol. 7, p. 16). The trial court admitted the extraneous evidence to prove Appellant must have known that the contraband was in the coffee cup, thereby rebutting

counsel's opening statement that Appellant was unaware of its presence. (Vol. 7, pp. 84-87; 89).

The extraneous evidence no more rebuts Appellant's denial of awareness of the contraband than establishes it. The value of this evidence lies only under propensity and character rationales. For the same reasons that the testimony and video were inadmissible to prove knowledge, discussed *supra*, the extraneous misconduct was inadmissible under a rebuttal theory as well.

The extraneous evidence also did not rebut the assertion that Appellant did not know that the substance he allegedly possessed was contraband. Appellant's knowledge of contraband was not put in issue by denying that he had knowledge of the presence of contraband. On the contrary, he readily admitted he knew exactly how to identify methamphetamine from his own personal previous use. His "defense" was not that he was a drug virgin incapable of recognizing contraband. His "defense" was that he did not know it was present and had nothing to do with its location at the bottom of Ms. Morgan's coffee cup.

"[M]erely by denying guilt of an offense with a knowledge-based *mens rea*, a defendant [does not] open[] the door to admissibility of prior convictions of the same crime. Such a holding would eviscerate Rule 404(b)'s protection and completely swallow the general rule against admission of prior bad acts." *United States v.*

*Caldwell*, 760 F.3d 267, 281 (3<sup>rd</sup> Cir. 2014). As the 8<sup>th</sup> Circuit has explained under a fact scenario almost identical to the instant case:

If Eggleston’s defense in the present case had been that he thought the cocaine was foot powder, or some other substance, the fact that he had previously possessed cocaine with the intention of distributing it would certainly be relevant, because it would tend to show that he knows what cocaine is and could not plausibly be thought to have mistaken it for some innocent substance. This, however, was not Eggleston’s defense. His theory was simply that the cocaine belonged to [the passenger], not to himself, and that, indeed, he did not even know that the cocaine was in the trunk. In this situation, we see no relevance whatever in the previous incident [except under a propensity rationale].

*United States v. Eggleston*, 165 F.3d 624, 626 (8<sup>th</sup> Cir. 1999), *cert. denied*, 526 U.S. 1031 (1999). *See also State v. Friend*, 433 N.W.2d 512, 515 (Neb. 1988) (defendant claimed lack of knowledge of contraband in her car; prior drug use inadmissible because “No claim was ever made that defendant did not know what cocaine looked like”). This extraneous evidence rebuts no fact of consequence in the case. The extraneous evidence was therefore not admissible under Rule 404(b).

**The uncharged misconduct evidence does not prove identity apart from propensity or character conformity.**

The prosecution invoked identity only once by uttering once in passing, during a discussion about whether to admit Appellant’s entire police record. (Vol. 7, p. 70). The deputy’s videotape recorded the officer’s astonishment that Appellant would

have a valid driver's license in light of his lengthy police record, which the prosecutor argued was relevant:

[It] all go[es] to, not action and conformity with that, but go[es] to indicators, clues, that Deputy Purcell has observed, which would go to knowledge, lack of mistake and identity, as well as preparation and plan, as – also included in the discussion – and I don't believe it is the subject of any of the Motion in Limine by Defense – is that the Defendant was happy to have a valid driver's license. And, again, it goes to indicators and it also goes to the lack of mistake or intent or plan of the Defendant.

(Vol. 7, p. 70). The trial court admitted the extraneous evidence because the court viewed defense counsel's opening statement as raising "the subtext of identity as to who was the perpetrator of the possession of the alleged controlled substance." (Vol. 7, p. 85).

Appellant's denial that he was unaware of the presence of the contraband did not raise the issue of identity. His identity was always part of the State's case: the State was obligated to prove Appellant possessed a baggie of what he knew to be methamphetamine. Appellant's denial added nothing to the State's burden of proof.

Appellant's identity was not a contested issue. The identities of the occupants of the truck where the contraband was discovered was no mystery. The case was not a "whodunit" but, in light of Morgan's actual possession of the contraband, a crime solved (Morgan did it). None of these circumstances has anything to do with Appellant's identity, which was established thoroughly by own his self-identification,

presentation of his valid driver's license and his detailed criminal history.

The State's incantation of "identity" was merely another way of conjuring its other arguments regarding intent/knowledge and rebuttal. For the same reasons that the extraneous evidence was inadmissible to prove knowledge/intent or to rebut a lack of knowledge, the evidence was also not admissible under an identity theory.

Even if identity were an issue, extraneous evidence is admissible only when a comparison of the extraneous act with the offense charged reveals enough unusual commonality that it constitutes the defendant's "handiwork" or "signature." *Bishop v. State*, 869 S.W.2d 342, 346 (Tex.Crim.App. 1993)(citations omitted)(regarding the signature/handiwork requirement as the "traditional rule" for the application of this 404(b) exception). "The State must show more than the mere repeated commission of crimes of the same type or class[.]" *Owens v. State*, 827 S.W.2d 911, 915 (Tex.Crim.App. 1992)(citations omitted). Like the trial court, this Court has no idea of the extraneous bad acts to make any sort of intelligible comparison. Identity, then, can hardly become the basis for admission of the extraneous evidence.

The prosecution made no effort to demonstrate that Appellant's prior drug possession and use was so similar to the alleged possession, that it compelled the

conclusion that Appellant possessed the contraband.<sup>4</sup> Its muttering the word “identity” is insufficient to render admissible Appellant’s drug abuse. Identity was a misplaced theory for admission of extraneous misconduct evidence. *See, e.g., Lopez v. State*, 288 S.W.3d 148, 166 (Tex.App. – Corpus Christi 2009, *pet. ref’d*)(trial court erred to admit prior condomless sex acts and concealment of HIV status under an identity rationale in a child sex case); *Booker v. State*, 103 S.W.3d 521 (Tex.App. – Fort Worth 2003, *pet. ref’d*)(conviction for aggravated robbery reversed for admission of prior violent crimes to prove identity); *Avila v. State*, 18 S.W.3d 736, 739 (Tex.App. – San Antonio 2000, *no pet.*)(conviction reversed where requisites for admission under identity theory not met); *Galvez v. State*, 962 S.W.2d 203, 205 (Tex.App. – Austin 1998, *pet. ref’d*)(prior gang membership inadmissible under identity exception in robbery prosecution); *Kiser v. State*, 893 S.W.2d 277, 282 (Tex.App. – Houston [1<sup>st</sup>] 1995, *no pet.*)(prior choking inadmissible under identity exception because it “is not such a similarity that even approaches the requisite level of uniqueness” for admission in sexual assault trial); *Cooper v. State*, 901 S.W.2d 757, 761-762 (Tex.App. – Beaumont 1995), *pet. dism’d, improvidently granted*, 933 S.W.2d 495 (Tex.Crim.App. 1996)(trial court erroneously admitted prior threats

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<sup>4</sup> On the contrary, the prior possession cases apparently involved cocaine, not methamphetamine. (Vol. 8, pp. 7-8).

under identity exception in aggravated sexual assault trial); *Lazcano v. State*, 836 S.W.2d 654 (Tex.App. – El Paso 1992, *pet. ref'd*)(prior choking in murder prosecution held inadmissible as proof of identity). Like the knowledge/intent and rebuttal theories, this unarticulated theory was mere camouflage for the introduction of character and propensity evidence.

#### **IV. The Court of Appeals erred when it held that prior possession and use of contraband may be admitted under the doctrine of chances.**

The Court of Appeals devoted a paragraph to a discussion on the doctrine of chances. *Work, supra* at 27-28. After analyzing whether the extraneous evidence was admissible, the Court of Appeals declared the evidence admissible “[f]or all these reasons.” *Work, supra* at 34. Presumably, the Court of Appeals held that the evidence was admissible under this doctrine.

The prosecution never presented this theory of admissibility to the trial court. The trial court never mentioned it and did not instruct the jury on it. This rationale therefore cannot become the basis for upholding the trial court’s decision. *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex.Crim.App. 2004)(trial court decision can be upheld if “correct on any theory of law applicable to the case, *in light of what was before the trial court at the time the ruling was made.*”)(emphasis added). *State v.*

*Esparza*, 413 S.W.3d 81, 90 (Tex.Crim.App. 2013)(State cannot “proffer[] for the first time on appeal” an alternative legal theory on which to affirm).

The proponent of otherwise inadmissible evidence must bear the burden of proving its admissibility. *White v. State*, 549 S.W.3d 146, 160 (Tex.Crim.App. 2018)(Keller, P.J., concurring)(“[W]hether an exemption or exception applies that would make evidence admissible” is “an issue on which the proponent has the burden.”). This Court, like others, has stressed the necessity for the State to meet its burden. *Montgomery v. State*, *supra* at 387 (“incumbent upon the proponent of the evidence to satisfy the trial court” the exception applies and the trial court “should honor any request” for clarity); *United States v. Hall*, 858 F.3d 254, 264 (4<sup>th</sup> Cir. 2017)(“the government must identify each proper purpose for which it will use the other acts evidence and explain how that evidence ‘fits into a chain of inferences – a chain that connects the evidence to [each] proper purpose, no link of which is a forbidden propensity inference’”)(quoting *United States v. Davis*, 726 F.3d 434, 442 (3<sup>rd</sup> Cir. 2013)); *United States v. Turner*, 781 F.3d 374, 389 (8<sup>th</sup> Cir. 2015)(“Simply asserting – without explanation – that the conviction is relevant to a material issue such as intent or knowledge is not enough to establish its admissibility”). The State made no effort to justify to the trial court its extraneous evidence under the doctrine of chances.

The State may not rely on a theory on appeal that was not presented to the trial court. *Esparza, supra*; *Sedani v. State*, 848 S.W.2d 314, 319 (Tex.App. – Houston [1<sup>st</sup> Dist.] 1993, *pet. ref’d*)(*op. on reh’g*)(State’s theory “not applicable to the case because it was not raised in the trial court”); *State v. Gonzales*, 850 S.W.2d 672, 675 (Tex.App. – San Antonio 1993, *pet. ref’d*)(“inappropriate for a reviewing court to determine that the suppression of the evidence is supported on other grounds when the trial court did not address any other possible grounds for the suppression”); *State v. Allen*, 53 S.W.3d 731, 733 (Tex.App. – Houston [1<sup>st</sup>] 2001)(“We do not believe the ‘law applicable to a case’ includes legal theories that were never raised in the trial court.”).

“[T]he mere fact that a correct ruling is given for the wrong reason will not result in a reversal” so long as “the decision is correct on any theory of law applicable to the case[.]” *Calloway v. State*, 743 S.W.2d 645, 651-52 (Tex.Crim.App. 1988). The State’s theory of law is “law applicable to the case” under review only “if the theory was presented at trial[.]” *State v. Copeland*, 501 S.W.3d 610, 613 (Tex.Crim.App. 2016). Because this theory was not raised in the trial court, it is not applicable to this case.

There is nothing for an appellate court to review under these circumstances. The court of appeals cannot consider whether the trial court abused its discretion

because as a matter of law, it cannot abuse a discretion it was never called upon to exercise. If “[t]he trial court’s ruling was specifically limited to the facts and legal arguments presented to it[,]” it “cannot be held to have abused its discretion in ruling on the only theory of law presented to it.” *State v. Mercado*, 972 S.W.2d 75, 78 (Tex.Crim.App. 1998). The court of appeals therefore erred in “affirming” a trial court decision that was never made. *State v. Sheppard*, 271 S.W.3d 281, 284 (Tex.Crim.App. 2008)(“error for the court of appeals to create and consider” decision trial court never made).

Insofar as the Court of Appeals relied on this doctrine, this theory of admissibility only applies to “highly unusual events [that] are unlikely to repeat themselves inadvertently or by happenstance.” *De La Paz v. State*, 279 S.W.3d 336, 347 (Tex.Crim.App. 2009). The State must establish this abnormality. *Martin v. State*, 173 S.W.3d 463, 467 (Tex.Crim.App. 2005). Personal drug abuse hardly meets this theory. On the contrary, prior drug abuse is a hallmark of future drug abuse.<sup>5</sup>

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<sup>5</sup> The facts of this case are distinguishable from those in *Dabney v. State*, 492 S.W.3d 309, 317 (Tex.Crim.App. 2016). In *Dabney*, the defense in opening statement declared that the defendant did not know there was a meth lab in his trailer. This Court held the State could prove the police had previously discovered he had a meth lab in the same trailer and had signed a confession to having produced meth from his lab. *Dabney v. State*, No. 02-12-00530-CR, at 7 (Tex.App. – Fort Worth, delivered October 16, 2014)(unpublished). While this Court remarked on the doctrine in passing, *Dabney* addressed whether the State could include extraneous evidence in its case in chief under the procedural circumstances of the case, and the applicability of the doctrine of chances was not the issue.

The doctrine of chances therefore does not justify the introduction of this propensity and character evidence.

**None of the Evidence was Admissible under Rule 403.**

Rule 403 provides:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

Tex.R.Evid. 403.

Rule 403 analysis begins with two considerations: (1) the probative force of this extraneous evidence and (2) the State's need for the evidence. The first inquiry is "how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation." *Gigliobianco v. State*, 210 S.W.3d 637, 640 (Tex.Crim.App. 2006); *Santellan v. State*, 939 S.W.2d 155, 169 (Tex.Crim.App. 1997). The fact of consequence in this case was Appellant's possession of the baggie of meth in Ms. Morgan's coffee cup.<sup>6</sup> His prior drug abuse does not make it more likely that he possessed the meth baggie; there exists no connection between the two. *United States v. Hall, supra*. Even if a connection existed other than through a

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<sup>6</sup> Had Appellant's familiarity with meth been the issue, this extraneous evidence would be strong proof that he in fact could readily identify this drug.

propensity and character rationale, it has low probative value.

The second inquiry focuses on the prosecution's need for the extraneous evidence. The State needed the extraneous evidence in this case in the same way the State "needs" the evidence in any other case – it makes conviction much more likely. But "need" in Rule 403 analysis refers to the availability of other evidence to establish the consequential fact and an evaluation of the strength of that other evidence. *Erazo v. State*, 144 S.W.3d 487, 495-96 (Tex.Crim.App. 2004). The State did not need this extraneous evidence.

Ms. Morgan, when asked who had the meth, stated, "You can test us both," which Deputy Brown testified meant "they both had knowledge." (Vol. 8, p. 45). When asked whether Appellant's behavior was consistent with one who had knowledge of the contraband, Brown replied, "Definitely had knowledge." (Vol. 8, p. 46). Brown also testified that Appellant was deceptive and he did not believe Appellant's denial of knowledge of the contraband. (Vol. 8, pp. 59-60). Finally, Brown explained:

[U]sually if somebody is going to – we can call it "take the rap for it," she would have said, "That is not his methamphetamine; that's mine." She didn't say that. She said, "It's not ours." And every time she responded, it was them as a couple. She never singly said, "It was mine."

(Vol. 8, pp. 60-61). Deputy Purcell testified Ms. Morgan asked him, "What if I say

it's mine, can you just let him go?" (Vol. 7, p. 121). Together with the reasonable inference that the meth was hastily thrown into a cup of coffee, this evidence established a good case for joint possession. The State had no need for the extraneous evidence.

Even if the State had a need for the evidence and the evidence had some logical probativeness, it remains inadmissible if it is unfairly prejudicial to the accused. Extraneous evidence is unfairly prejudicial if it has the "tendency to suggest decision on an improper basis[.]" *Montgomery v. State, supra* at 389. There is "no question that propensity would be an 'improper basis' for conviction[.]" *Old Chief v. United States*, 519 U.S. 172, 181-182 (1997). *State v. Mechler*, 153 S.W.3d 435, 440 (Tex.Crim.App. 2005)("Unfair prejudice" refers to a "tendency to tempt the jury into finding guilt on grounds apart from proof of the offense charged."); *Gonzalez v. State*, 544 S.W.3d 363, 372-73 (Tex.Crim.App. 2018)(Evidence is unfairly prejudicial if it can "lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged.").

This extraneous evidence certainly had the "tendency to suggest" that Appellant was a drug abuser who must have possessed the meth in this case because he had done so previously. This Court has "recognized that a greater prejudice to the defendant results from the revelation of past criminal conduct than non-criminal 'bad

acts.” *Abdnor*, *supra* at 738 (citing *Plante v. State*, 692 S.W.2d 487, 490 n.3 (Tex.Crim.App. 1985)). In light of the fact that the extraneous evidence was comprised solely of criminal conduct, Appellant was unfairly prejudiced by this evidence.

The trial court should also have excluded the extraneous evidence in this case because it confused the issue whether Appellant actually knowingly possessed the contraband with whether Appellant was familiar with methamphetamine. *Rumbaugh v. State*, 589 S.W.2d 414, 418 (Tex.Crim.App. 1979); *Albrecht v. State*, *supra* at 100; *Gipson v. State*, 619 S.W.2d 169, 170 (Tex.Crim.App. 1981)(extraneous offenses generally excluded because admission confuses and prejudices the issue of guilt of the instant offense). If prosecutors and trial judges can confuse these issues, it is fair to imagine jurors would also be confused. The trial court’s instruction to consider Appellant’s character as a drug addict, his prior drug conviction and his recent use of methamphetamine only for “knowledge” did nothing to clarify that element of the offense.

In the same way, the evidence also misled the jury. Propensity evidence is powerfully persuasive. The jury was invited to follow the illogic Rule 404(b) is meant to preclude, i.e., because Appellant had the character of a drug addict and had previously possessed methamphetamine in the past, he is obviously guilty in the

instant case. A juror in this case might justifiably ask why else was this extensive evidence admitted.

Another factor is “the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted.” *Gigliobianco, supra* at 641-642. The Court of Appeals decided this factor weighed in favor of admission. Counsel for Appellant takes issue with the Court of Appeals’ time consumption analysis. The Court of Appeals compared the time it took to introduce the extraneous evidence against the entire record. *Work, supra* at 38-39. This approach is skewed.

The Court of Appeals noted that the reporter’s record was “over 300 pages in length.” *Id.* Volumes 7 and 8 constituted the trial so far as jurors saw the evidence, which totaled 307 pages. But when the opening and closing arguments, hearings outside the presence of the jury, evidence from Herman Carrel (the DPS crime lab scientist), and other matters are excluded, a different total time consumption picture emerges. This picture regarding the presentation of evidence for jurors is the only one that matters because this Rule 403 factor is concerned with the impact on jurors.

Deputy Purcell testified before the jury over the span of 87 pages. (Vol. 7, pp. 17-67; 98-112; 115-138). Deputy Brown’s testimony comprised 47 pages. (Vol. 8, pp. 14-61). While the record does not reflect how much time their testimony

consumed, it does reflect the length of the videotapes, down to the second.

The Court of Appeals' opinion reflected its determination that the videotapes "were, at most, a few minutes in length in total[.]" *Id.* Yet the record reflects that the jury resumed at 11:59 a.m., then recessed at 2:29 p.m., just after State's Exhibit 7 was played. (Vol. 7, pp. 115-117). This video was over 125 minutes long, and the arrest and investigation begins 52 minutes after the commencement of the videotape for a total of 73 minutes of relevant evidence. (State's Exhibit 7).

The prosecution introduced a second video the next day, the one from Deputy Brown's dashcam. (State's exhibit 13). This video is 1:21:47 long, but the record reflects the prosecutor stopped the video at 56:29, though he apparently stopped and started this tape at other unknown junctures. (Vol. 8, pp. 36-39). Nevertheless, the entirety of this video evidence was not more than a "few minutes in length in total," as the Court of Appeals said, but constituted most of the State's case.

Casting aside its value as propensity and character evidence, proof of Appellant's prior drug history was at best weak probity of whether he actually possessed the meth baggie. The extraneous evidence diverted this central issue to considerations of his criminality and familiarity with drugs, thereby confusing the issue and misleading jurors down the path of prejudice against Appellant. That prejudice was unfair because it invited the jurors to find guilt on matters other than

proof Appellant possessed the contraband. The State did not need the evidence, yet devoted a significant portion of its case to its introduction. The trial court therefore abused its discretion by admitting the evidence under Rule 403.

The prosecution exhibited a strong familiarity of the vernacular meanings of knowledge and identity. But these concepts are terms of art demanding that the professionals charged within our system of justice to, at the very least, articulate discreet and intelligible legal bases for admissibility. Mumbling “identity” and summoning “knowledge” and “rebuttal” as self-enchanting charms for propensity and character evidence surely do not meet this Court’s standard for proponents of evidence known for its perversion of justice. There must be more than the watery expressionisms of prosecutors worried about the strength of their cases before trial courts should ever admit such noxious evidence.

Muddy waters streamed into this trial through these muddled theories of admissibility. On its waves, it carried the State’s burden of proof just as it submerged this Court’s overriding interests in a fair trial on its merits. The drowning of Appellant’s right to a fair trial in this case did not merely offend rules of evidence, but violated due process as well. U.S. Const. art. XIV. Mr. Work was tried for his drug addiction. This Court should reverse this conviction and affirm its disdain of character trials. Tex.R.App. Pro. 44.2.

## **PRAYER FOR RELIEF**

*WHEREFORE, PREMISES CONSIDERED*, Appellant respectfully prays this Court to reverse the appellate court's judgment and remand the case to the trial court for a new trial free from propensity and character evidence.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Keith S. Hampton', is written above the printed name.

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## **CERTIFICATE OF COMPLIANCE**

By affixing my signature above I hereby certify that this document contains a word count of 7379 and therefore complies with Tex.R.App.P. 9.4(i)(3).

## **CERTIFICATE OF SERVICE**

I hereby certify, by my signature above, that a true and correct copy of the above and foregoing *Appellant's Brief on the Merits* has been electronically delivered to the Brown County District Attorney's Office, via Efile and Serve, to Elisha Bird, [elisha.bird@browncountytexas.org](mailto:elisha.bird@browncountytexas.org), and to Stacey Soule, the State Prosecuting Attorney, [stacey.soule@spa.texas.gov](mailto:stacey.soule@spa.texas.gov), on February 27, 2019.

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## APPENDIX

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State's 404(b) Notice

Defendant's Written Objection to Admissibility of Extraneous Offenses

Defendant's First Amended Motion to Suppress Audio Portions of DVD

NO. 3106

THE STATE OF TEXAS  
V.  
SIDNEY ALEX WORK

§  
§  
§

IN THE DISTRICT COURT  
35<sup>TH</sup> JUDICIAL DISTRICT  
MILLS COUNTY, TEXAS

**NOTICE OF INTENT TO OFFER EVIDENCE OF PRIOR CONVICTIONS  
AND EXTRANEOUS OFFENSES**

The State hereby gives notice as required by Rules 404(b) and 609(f) of the Texas Rules of Criminal Evidence and Article §37.073(g) of the Texas Code of Criminal Procedure, of its intent to offer evidence of the following convictions and extraneous offenses in its case in chief, on rebuttal, at punishment, or at any other phase of the trial where it is admissible.

I.

Defendant's entire criminal history, extraneous offenses, or prior bad acts, served via pretrial discovery, and/or otherwise available pursuant to open file policy of State's prosecutorial office.

II.

On or about June 2, 2015, in Mills County, Texas, the defendant committed the offense of Possession of Drug Paraphernalia;

III.

On or about August 10, 2012, in Cause No. D-1-DC-12-202362 in Travis County, Texas, the defendant was convicted of the offense of Possession of a Controlled Substance;

IV.

On or about August 15, 2012, in Cause No. C-1-CR-12-207439 in Travis County, Texas, the defendant was convicted of the offense of Possession of a Controlled Substance;

V.

On or about August 3, 2012, in Cause No. 12-02208-1 in Williamson County, Texas, the defendant was convicted of the offense of Possession of a Controlled Substance;

VI.

On or about August 1, 2012, in Cause No. 12-0256-K277 in Williamson County, Texas, the defendant was convicted of the offense of Possession of a Controlled Substance;

VII.

On or about August 3, 2012, in Cause No. 12-01522-3 in Williamson County, Texas, the defendant was convicted of the offense of Driving While License Invalid with previous conviction;

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JUL 5 2015  
CAROLYN FOSTER, County Clerk  
Mills County, Texas  
By \_\_\_\_\_ Deputy

VIII.

On or about August 3, 2012, in Cause No. 11-08779-3 in Williamson County, Texas, the defendant, was convicted of the offense of Failure to Comply with duty upon striking unattended vehicle;

IX.

On or about August 3, 2012, in Cause No. 11-08780-3 in Williamson County, Texas, the defendant was convicted of the offense of Theft Over \$500 Under \$1,500;

X.

On or about November 17, 2011, in Cause No. 11-06494-2 in Williamson County, Texas, the defendant was convicted of Driving While License Invalid with previous conviction;

XI.

On or about April 14, 2011, in Cause No. 10-09506-1 in Williamson County, Texas, the defendant was convicted of the offense of Possession of Marihuana;

XII.

On or about November 29, 2010, in Cause No. 10-04354-1 in Williamson County, Texas, the defendant was convicted of the offense of Cruelty to Animals;

XIII.

On or about June 3, 2010, in Cause No. C-1-CR-10-207392 in Travis County, Texas, the defendant was convicted of the offense of Driving While License Invalid with previous conviction;

XIV.

On or about April 15, 2010, in Cause No. 09-08290-3 in Williamson County, Texas, the defendant was convicted of the offense of Resist Arrest;

XV.

On or about February 25, 2010, in Cause No. 19966 in Live Oak County, Texas, the defendant was convicted of the of offense of Driving While License Invalid with previous conviction;

XVI.

On or about June 3, 2010, in Cause No. C-1-CR-09-402440 in Travis County, Texas, the defendant was convicted of the offense of Obstructing Highway Passageway;

XVII.

On or about June 3, 2010, in Cause No. C-1-CR-10-207392 in Travis County, Texas, the defendant was convicted of the offense of Driving While License Invalid with previous conviction;

XVIII.

On or about March 4, 2010, in Cause No. 45920 in Bastrop County, Texas, the defendant was convicted of the of offense of Driving While License Invalid with previous conviction;

XIX.


On or about May 13, 2009, in Cause No. 08-901 in Washington County, Texas, the defendant was convicted of the of offense of Driving While License Invalid with previous conviction;

XX.

On or about May 22, 2008, in Cause No. 0613813 in Williamson County, Texas, the defendant was convicted of the of offense of Theft;

Signed this 5 day of November, 2015.

Respectfully Submitted,

  
\_\_\_\_\_  
MICHEAL B. MURRAY  
35<sup>th</sup> District Attorney  
State Bar No. 00792955  
200 S. Broadway, Brownwood, TX 76801  
Tel: (325) 646-0444 Fax: (325) 643-4053

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing document was served to the office of Larry Meadows, Attorney at Law, by facsimile on the 5 day of November, 2015.

  
\_\_\_\_\_  
MICHEAL B. MURRAY

NO. 3106

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At 8:51 O'clock a M

STATE OF TEXAS

§ IN THE DISTRICT COURT

vs.

§  
§ 35<sup>TH</sup> JUDICIAL DISTRICT

MAY 18 2016

SIDNEY ALEX WORK

§ MILLS COUNTY, TEXAS

CAROLYN FOSTER  
County and District Clerk  
Mills County, Texas  
Deputy

**DEFENDANT'S WRITTEN OBJECTION TO ADMISSIBILITY OF EXTRANE  
OFFENSES, REQUEST FOR PROCEDURAL DETERMINATION BY TRIAL COURT  
WITH FINDINGS OF FACTS AND CONCLUSIONS OF LAW AND FOR LIMITING  
INSTRUCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

Now Comes Sidney Alex Work, the Defendant herein, by and through Counsel, and files this his Written Objection to Admissibility of Extraneous Offenses, Request for Procedural Determination by Trial Court with Findings of Fact and Conclusions of Law, and for Limiting Instruction, and in support thereof would show the Court as follows:

**I.**

The State of Texas is seeking the admission of extraneous offenses. Such evidence may be admissible where it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, Texas Rules of Evidence. "Evidence which is not relevant is inadmissible." Rule 402, Texas Rules of Evidence. Although evidence may be deemed relevant, such evidence is still not admissible if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Rule 403, Texas Rules of Evidence.

**II.**

The Defendant objects to the admission of such extraneous offense evidence under Rules 401, 402, 403, and 404(b) and requests the State prove such evidence has relevance other than

proving the character of the Defendant, or suggesting that he acted in conformance with a criminal propensity. *Montgomery v. State*, 810 S.W.2d 372 (Tex. Crim. App. 1990).

On the DVD of James Purcell, Defendant objects to all statements regarding extraneous offenses and bad acts of Defendant mentioned on the DVD including but not limited to the following:

1. 7:40 time Dispatch describes Defendant with multiple entries-eight pages of entries;
2. 10:00 Defendant states has plenty on record -Purcell responds with eight pages of entries;
3. 13:44 Officer says again eight pages of entries;
4. 13:56 Brown asks about prior criminal history-Defendant responds with arrested for drugs;
5. 16:00 Dispatch announces convictions of Defendant;
6. 16:29 Brown states felony possession conviction with Defendant;
7. 16:33 Brown and Defendant discuss felony conviction;
8. 16:40 Brown discusses Defendants past;
9. 55:44 Purcell miranda rights read to Defendant before;
10. 58:38 - 59:20 Purcell asks how long since used methamphetamine- Discussion about Defendant's use of methamphetamine months prior and with a needle.
11. 1:11:33 Record stated by Defendant;
12. 1:11:41 Purcell asks how many times you've been arrested;
13. 1:11:42 Defendant answers plenty;
14. 1:11:46 Purcell -eight pages on driving record;
15. 1:11:50 Purcell- don't understand how you have a driver's license;
16. 57:17-26 Brown states affirmative link;
17. 1:15:50 Brown state another affirmative link.

On the DVD of Johnny Brown, Defendant objects to all statements regarding extraneous offenses and bad acts of Defendant mentioned on the DVD including but not limited to the following:

1. 2:27 time Dispatch describes Defendant with multiple entries-eight pages of entries;
2. 4:45 Purcell stating plenty on your record;
3. 8:27 Officer says again eight pages of entries;
4. 8:37 - 9:43 Brown asks about prior dealings with law-Defendant responds with arrested for drugs; Brown for what. Defendant for drugs. Brown-what was the drug deal about. Defendant's explains. Brown about probation. Brown about parole. Brown when off parole;
5. 10:27-10:55 Brown asks about drug charge. Explanation. And Dispatch with criminal history. Brown easy to get mixed up in;
6. 11:11 - 11:16 Brown talks about felony conviction and Defendant responds;
7. 11:24 Brown done in past;
8. 52:00 - 52:08 Brown affirmative link;
9. 53:21 - 54:00 Brown ask about prior use of methamphetamine -Discussion of prior use 2 & ½ to 3 months ago and how.

### III.

If the Court overrules the objection in paragraph II above, the Defendant hereby requests that the Court make findings of fact and conclusions of law supporting its determination that the evidence (1) establishes an elemental fact, (2) establishes an evidentiary fact that inferentially leads to an elemental fact, (3) rebuts a defensive theory, or (4) has some other logical relevance, and that the need for the evidence outweighs reasons for exclusion under Rule 403. *See Montgomery, supra.*

### IV.

Further, the Defendant requests that the Court properly instruct the jury to confine and limit its consideration of such evidence to the purpose articulated by the State, under the authority of Rule 105, Texas Rules of Evidence.

V.

In support of the foregoing, Defendant makes these requests to preserve his rights to the effective assistance of counsel, due process and due course of law, in accordance with the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10, 13 and 19 of the Texas Constitution, and Articles 1.04, 1.05, and 1.051 of the Texas Code of Criminal Procedure.

WHEREFORE, PREMISES CONSIDERED, Defendant requests this Honorable Court grant to Defendant all relief requested herein and such other relief to which he may be entitled.

Respectfully submitted,



CHRISTOPHER S. TILL  
301 W. Central  
Comanche, TX 76442  
Tel: (325) 356-5248  
Fax: (325) 356-2942  
State Bar No. 20030300  
Attorney for Sidney Alex Work

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Defendant's Written Objection to Admissibility of Extraneous Offenses, Request for Procedural Determination by Trial Court with Findings of Facts and Conclusions of Law and for Limiting Instruction was hand delivered to the District Attorney's Office, on May 18, 2016.



CHRISTOPHER S. TILL

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RECORDED MAY 23, 2016 36

NO. 3106

STATE OF TEXAS

vs.

SIDNEY WORK

§ IN THE DISTRICT COURT  
§  
§ 35TH JUDICIAL DISTRICT  
§  
§ MILLS COUNTY, TEXAS

**FIRST AMENDED MOTION TO SUPPRESS AUDIO PORTIONS OF THE DVD**

**TO THE HONORABLE JUDGE OF SAID COURT:**

Now comes Sidney Work, Defendant in the above entitled and numbered cause, by and through his attorney of record, and respectfully moves this Court to suppress the audio portion of the videotape. Said videotape depicts the stop and arrest of defendant for possession of a controlled substance and tampering with evidence. For good cause the defendant shows the following:

A. On or about June 2, 2015, the defendant was arrested for for possession of a controlled substance and tampering with evidence, felony offenses. A videotape of the defendant was made at the scene of the arrest.

B. The defendant contends that the recording contains comments made that are not admissible into evidence at the guilt/innocence portion of his trial. There are two dvd's that contain multiple statement concerning Defendant's past criminal record.

On the DVD of James Purcell, Defendant objects to all statements regarding extraneous offenses and bad acts of Defendant mentioned on the DVD including but not limited to the following:

1. 7:40 time Dispatch describes Defendant with multiple entries-eight pages of entries;
2. 10:00 Defendant states has plenty on record -Purcell responds with eight pages of entries;
3. 13:44 Officer says again eight pages of entries;

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CAROLYN FOSTER  
County and District Clerk  
Mills County, Texas

By [Signature] Deputy  
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4. 13:56 Brown asks about prior criminal history–Defendant responds with arrested for drugs;
5. 16:00 Dispatch announces convictions of Defendant;
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8. 16:40 Brown discusses Defendants past;
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Defendant's explains. Brown about probation. Brown about parole. Brown when off parole;


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8. 52:00 - 52:08 Brown affirmative link;
9. 53:21 - 54:00 Brown ask about prior use of methamphetamine -Discussion of prior use 2 & ½ to 3 months ago and how.

C. Objections are to the above statements at the approximate times on the respective DVDs. Defendant's criminal history is not admissible. Further, Officer's conclusions of law are not admissible.

D. Defendant objects to the admission of any statement about Defendant's past crimes under 404b of the Texas Rules of Evidence, the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution; Article I, Section 10 and Section 19 of the Texas Constitution, and Articles 1.03 and 1.04 of the Texas Code of Criminal Procedure.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court grant this Motion and suppress the audio portions of the videotape based on the above objections.

Respectfully submitted,

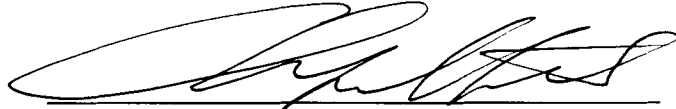


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attorneytill@gmail.com  
Attorney for Sidney Work

**CERTIFICATE OF SERVICE**

This is to certify that on May 18, 2016, a true and correct copy of the above and foregoing document was served on the District Attorney's Office, Mills County, Texas, by hand delivery.

A handwritten signature in black ink, appearing to read 'Christopher S. Till', written over a horizontal line.

Christopher S. Till